

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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Order Instituting Rulemaking)
In the Review of the)
California High Cost Fund)
_____)

R.06-06-028

**OPENING COMMENTS OF SPRINT NEXTEL
ON ASSIGNED COMMISSIONER'S RULING ON
PHASE II ISSUES RELATING TO THE
"CALIFORNIA ADVANCED SERVICES FUND"**

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Table of Contents

Table of Contents.....	i
Table of Authorities	iii
Introduction.....	1
Discussion.....	5
I. THE LEGAL AND POLICY ARGUMENTS FOR FUNDING THE CASF UNDER EITHER THE CHCF-B PROGRAM OR PU CODE § 701 WOULD BENEFIT FROM FURTHER ATTENTION.....	5
A. Neither PU Code § 739.3 nor PU Code § 701 Provides An Ideal Foundation for the CASF.....	5
1. D.07-09-020 Does Not Actually Hold that the Commission has Authority to Create a CASF.....	6
2. The Claim that PU Code § 739.3 Authorizes the Commission to Create and Fund a CASF Needs Shoring Up.	6
3. None of the Other “Existing Statutes” Discussed in D.07-09-020 Appears to Provide the Requisite Authority for Creation of a CASF.....	9
4. PU Code § 701 Does Not Confer the Requisite Authority to Create the CASF....	12
5. Express Legislative Authority for this Important Initiative Would Appear to Be Desirable.	13
B. Substantial Policy Issues Also Point toward the Desirability of Legislation Directly Authorizing Creation of a CASF.....	14
II. THE ACR’S QUESTIONS CONCERNING FUNDING OF THE CASF APPEAR TO CALL FOR CONSIDERABLE SPECULATION.....	19
III. INCLUDING A REQUIREMENT THAT “BASIC RESIDENTIAL SERVICE” MUST BE A COMPONENT OF ANY BROADBAND SERVICES FUNDED BY THE CASF CREATES A SUBSTANTIAL RISK THAT, AS MATTERS PRESENTLY STAND, THE CASF WILL NOT BE TECHNOLOGICALLY NEUTRAL, BUT WILL DISCRIMINATE AGAINST WIRELESS CARRIERS.....	20
IV. THE APPLICATION PROCESS SET FORTH IN APPENDIX 3 TO D.07-09-020 REQUIRES FURTHER REFINEMENT, INCLUDING THE APPOINTMENT OF A NEUTRAL BOARD FOR SELECTION OF CASF FUNDING RECIPIENTS.....	22

V. THE PROPOSAL FOR A “60-DAY WINDOW FOR RECEIPT OF COMPETING APPLICATIONS” APPEARS TO HAVE SUBSTANTIAL MERIT..... 22

VI. AUDITING THE CASF PROGRAM WILL BE DIFFICULT UNDER THE BEST OF CONDITIONS AND MAY PROVE TO BE IMPOSSIBLE..... 23

VII. IT IS DIFFICULT TO IMAGINE THE CIRCUMSTANCES UNDER WHICH THE COMMISSION COULD DISBURSE SURCHARGE FUNDS TO ENTITIES OTHER THAN PUBLIC UTILITY “TELEPHONE CORPORATIONS.” 24

Conclusion25

Certificate of Service

Table of Authorities

Federal Cases

<i>National Cable and Telecommunications Association v. Brand X Internet Services</i> (2005) 545 U.S. 967	8
---	---

California Cases

<i>Assembly of the State of California v. Public Utilities Commission</i> (1995) 12 Cal. 4 th 87	11, 12, 16
---	------------

Federal Communications Commission Decisions

<i>In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)</i> (1980) 77 F.C.C. 384	8
---	---

California Public Utilities Commission Decisions

<i>Order Instituting Rulemaking into Review of the California High Cost Fund B Program</i> , R.06-06-028, Interim Opinion Adopting Reforms to the High Cost Fund-B Mechanism [D.07-09-020] (2007) __ CPUC 2d __, 2007 Cal. PUC LEXIS.....	<i>passim</i>
<i>Rulemaking on the Commission's Own Motion into Universal Service and to Comply with the Mandates of Assembly Bill 3643</i> , R.95-01-020; <i>Investigation on the Commission's Own Motion into Universal Service and to Comply with the Mandates of Assembly Bill 3643</i> , I.95-01-021; Opinion [D.96-10-066] (1996) 68 CPUC 2d 524, 1996 Cal. PUC LEXIS 1046 ("D.96-10-066").....	<i>passim</i>

California Education Code

Section 19325.....	10
Section 19325.1.....	10

California Public Utilities Code

Section 270.....	10, 12
Section 276.....	10, 11, 12
Section 276.5.....	5, 10, 11, 12
Section 701.....	5, 12, 18
Section 709.....	9
Section 709.6.....	9

Section 709.7.....	9
Section 739.3.....	<i>passim</i>
Section 5800.....	9
Section 5810.....	9
Section 5890.....	9
 <u>Federal Legislation</u>	
S.1492 (Broadband Data Improvement Act of 2007).....	3
 <u>California Legislation</u>	
Digital Infrastructure and Video Competition Act of 2006.....	9
Chapter 1.5 of the Public Utilities Act.....	10
 <u>Miscellaneous</u>	
May 2005 Broadband Report.....	3
September 2006 Update Report.....	3

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Introduction

Pursuant to the schedule provided in the September 12, 2007 Assigned Commissioner’s Ruling of Commissioner Chong on “Phase II Issues Relating to the ‘California Advanced Services Fund’” (“the ACR”), Sprint Communications Company, L.P. (U 5112 C), Sprint Telephony PCS, L.P. (U 3064 C), Sprint Spectrum L.P. as agent for Wireless Co., L.P. (U 3062 C) *dba* Sprint PCS, and Nextel of California, Inc. (U 3066 C) (collectively, “Sprint Nextel”), respectfully submit these Opening Comments regarding the issues specified therein.

The ACR solicits comments concerning the establishment and funding of a “California Advanced Services Fund” (“CASF”). The ACR asks what rules should be formulated to determine eligibility to draw from the CASF, taking into consideration the relevant policy and legal rationales for a CASF program set forth at pages 52-70 of D.07-09-020.¹ Sprint Nextel’s understanding of the proposal in D.07-09-020 for creation of the CASF is that, in ways and amounts as yet unspecified, some of the funds collected through the California High Cost Fund-B (“CHCF-B”) surcharge would be set aside and devoted to the CASF program on a “limited,

¹ *Order Instituting Rulemaking into Review of the California High Cost Fund B Program*, R.06-06-028, Interim Opinion Adopting Reforms to the High Cost Fund-B Mechanism [D.07-09-020] (2007) __ CPUC 2d __, 2007 Cal. PUC LEXIS __ (mimeo. issued September 13, 2007) (“D.07-09-020”)(all references herein are to the Commission’s mimeo. print).

one-time-only” basis.² The ACR solicits comments on seven different sets of issues, each of which is discussed below.

At the outset, Sprint Nextel notes that it supports expanding the availability of affordable broadband services in high cost areas in California. As a leading provider of wireless broadband services in California and elsewhere in the United States, Sprint Nextel looks forward to working with the Commission to develop a program that encourages competition among all broadband technologies while also minimizing funding burdens on California residents through a well designed and effective program.

In an ideal world, there would be a perfect match between the Commission’s vision for expanding broadband services in California and the Commission’s jurisdiction to fund the development of those services. Sprint Nextel is concerned, however, that the Commission needs to shore up the legal footing for the CASF. This is crucial because, unless they are properly resolved, legal uncertainties regarding the CASF could translate into business uncertainties, which in turn could undermine the program. Ideally, in its next decision in this proceeding, the Commission will successfully resolve the legal uncertainties discussed below; alternatively, the Commission could seek clear and unambiguous authorization from the Legislature for a new CASF funded by a new, and separate, CASF surcharge. In either event, the Commission should also resolve to gather more information about what, precisely, is needed for a CASF program. If it takes these steps, the Commission will establish the key preconditions – legal certainty and possession of critical information – for making the CASF a success. Upfront planning and attention to details, even if time-consuming, will yield many downstream benefits and ultimately result in a program that brings advanced services to under- and unserved areas more quickly and successfully.

² See *id.* at 72 (“ . . . the CASF would be a limited, one-time-only source of matching funds to build advanced infrastructure in California and would work in conjunction with the California Emerging Technology Fund [“CETF”]”

Based on the minimal information available to date regarding the CASF,³ a somewhat guarded view of this initiative is necessary. On the one hand, as indicated, Sprint Nextel appreciates the Commission's desire to expand the availability of broadband services in high cost areas in California. Indeed, Sprint Nextel is already committed to bringing a technologically advanced mobile broadband network to California – a true “state of the art” “4G” WiMax service. On the other hand, if the CASF only serves to provide funds where they are not actually necessary, or to subsidize inefficient carriers that would otherwise not be making investments in California, it could dampen incentives for private firms to invest in California. Firms may ask why they should invest in building facilities for advanced services if the State is going to undermine the advantages of being a first mover by funding their competitors with “low cost” or even “no cost” money.

Sprint Nextel believes the Commission should conduct a careful investigation regarding the needs that will actually be met by this fund.⁴ Until there is more information from the Commission as to what, exactly, the CASF will fund, and why, and in what amounts, and what, exactly, would be expected or required of a CASF recipient, there are simply too many unknowns to comment definitively on many of the important issues specified in the ACR. The Commission should expand prior efforts to map the current availability of broadband service offerings in California:⁵ more information regarding the availability, speeds, prices, features, and

³ D.07-09-020 states that the Commission “. . . will seek comment on the overall size and funding of the CASF.” *Id.*

⁴ Sprint Nextel acknowledges the work done to date by the Commission and its Staff in the “May 2005 Broadband Report” and the “September 2006 Update Report.” The reports are available at: <http://www.cpuc.ca.gov/static/telco/reports/broadbandreports.htm>. These reports, however, do not explain how even a CASF program as large as, say, \$100 million will actually expand the penetration of broadband services into California's culturally diverse and low- and lower-income populations. The Commission should more closely study what a CASF program would have to do in order to expand the penetration of broadband services into California's population.

⁵ See <http://www.connectkentucky.org/Mapping/> for information concerning, for example, Kentucky's program for mapping the availability of broadband services in that State. On the federal side, S. 1492 reflects Congressional awareness of the need for mapping the current availability of broadband services. See GovTrack.us. S. 1492--110th Congress (2007): Broadband Data Improvement Act, *GovTrack.us (database of federal legislation)* <http://www.govtrack.us/congress/bill.xpd?bill=s110-1492> (accessed Sep 24, 2007). See, e.g., Summary of bill.

“service packages” being offered to Californians today is critical. Without such information, the Commission may risk “throwing money” at a problem it does not fully understand and undertaking efforts that are redundant to those already underway. Keeping in mind that the funds the Commission collects from ratepayers (whether through the CHCF-B Fund or some other source) are in the nature of a tax and an income transfer, considerable care should be taken before the Commission appropriates public funds for the benefit of private firms: the Commission must ensure, above all, that funding procedures and parameters are fair, open, and transparent, and that they promote competition among all technologies.

Among the more pressing concerns is not simply the Commission’s legal authority to expend funds that have been collected from ratepayers under one rationale (subsidizing the cost of “basic service” in high cost areas⁶) for a completely different purpose (namely, subsidizing the cost of infrastructure for “advanced services” in high cost areas that are “underserved or not served at all”⁷). Rather, of even greater concern are questions concerning the Commission’s ability to guarantee that, halfway into the effort, a CASF program will not become embroiled and bogged down in complex and costly taxpayer litigation – which could delay and even derail the whole program. Substantial business decisions and investments cannot be undertaken without equally substantial assurances that the Commission has the authority to develop a CASF. The Commission should shore up the legal and policy rationales on which the CASF rests. Parties receiving CASF moneys for infrastructure in high cost areas need to be fully assured that such

⁶ As explained in D.96-10-066, the purpose of the California High Cost Fund-B (“CHCF-B”) – the fund that generates the moneys that ostensibly would be used to fund the CASF – is to support the availability of basic telephone service in high cost areas of California. *See Rulemaking on the Commission’s Own Motion into Universal Service and to Comply with the Mandates of Assembly Bill 3643*, R.95-01-020; *Investigation on the Commission’s Own Motion into Universal Service and to Comply with the Mandates of Assembly Bill 3643*, I.95-01-021; Opinion [D.96-10-066] (1996) 68 CPUC 2d 524, 1996 Cal. PUC LEXIS 1046 (“D.96-10-066”).

⁷ D.07-09-020 at 54. In view of the ubiquitous availability of satellite-based broadband services, Sprint Nextel is somewhat skeptical that there are areas in California that are “not served at all” with at least some broadband download services, although they may not ubiquitously be at 3 MBPS speeds.

funds would not someday be subject to recapture by the State. Obtaining authorizing legislation would be the most certain means of resolving this problem.⁸

Discussion

I. THE LEGAL AND POLICY ARGUMENTS FOR FUNDING THE CASF UNDER EITHER THE CHCF-B PROGRAM OR PU CODE § 701 WOULD BENEFIT FROM FURTHER ATTENTION.

The ACR first asks parties to compare the strength of policy and legal arguments for funding the CASF under the CHCF-B program and the “all things necessary and convenient” power conferred by PU Code § 701:

1. Address the policy merits and legal basis for funding and administering the CASF under the provisions of the CHCF-B program versus establishing an entirely new independent funding program pursuant to the Commission’s statutory authority under Pub. Util. Code § 701.

A. Neither PU Code § 739.3 nor PU Code § 701 Provides An Ideal Foundation for the CASF.

Simply stated, the issue the Commission must resolve at the outset of this phase of this proceeding is whether it has jurisdiction to create a CASF under PU Code § 739.3 or PU Code § 701. The Commission would do well to shore up the jurisdictional footing for the CASF in its next decision in this proceeding. To remove doubt as to its jurisdiction, the Commission could seek new legislation that directly authorized such a fund. New legislation would relieve the Commission from having to require (if it is a requirement) that “basic telephone service” be provided as a “component” of any CASF-funded broadband services.⁹ In its next decision, the

⁸ In almost any event, the desirability of legislative action is apparent: the statute on which the Commission most directly relies to justify the creation of a CASF, Public Utilities Code Section (“PU Code §”) 739.3, *see* D.07-09-070 at 64, 67, *expires* as of January 1, 2009, unless a statute that is enacted on or before January 1, 2009, “deletes or extends that date.” *Id.*, subd. (f). The other statute on which the Commission apparently relies, at least in part, for authority to create a CASF is PU Code § 276.5; this statute also expires as of January 1, 2009. If the Commission were to request the Legislature to extend the expiration date of PU Code § 739.3, that would present an opportunity for the Commission to ask the Legislature to authorize, clearly and unambiguously, a separate, and separately funded, advanced services fund.

⁹ *See* D.07-09-020 at 69.

Commission could explain that, in this context, it is using the term “basic telephone service” only to refer to “voice service” and not to “basic service” as it was defined in D.96-10-066.

1. D.07-09-020 Does Not Actually Hold that the Commission has Authority to Create a CASF.

Although D.07-09-020 contains an extensive discussion of the jurisdictional grounds on which the Commission *may* be able to create a CASF, the decision does not actually hold that the Commission has such jurisdiction. The Commission has merely elected “to consider providing funding under Pub. Util. Code § 739.3 for deployment of broadband facilities in unserved and underserved high cost areas of California.”¹⁰ Review of the Conclusions of Law indicates that the Commission only concluded that “. . . it is appropriate to pursue further inquiry in Phase II” regarding encouragement and funding of a CASF, as well as appropriate rules to govern how applicants may qualify for funding.¹¹

According to the Commission, this “*may be* the best way” to consider recent technology “advances” and achieve universal service goals.¹² These statements, however, fall far short of a definitive holding that the Commission has the requisite authority to create and disburse funds from a CASF. Parties will not fail to notice the absence of an unalloyed, straightforward claim that the Commission has jurisdiction to create a CASF. Unless and until the Commission can persuasively demonstrate that it has such authority, parties will necessarily feel that they “proceed at their own risk.”

2. The Claim that PU Code § 739.3 Authorizes the Commission to Create and Fund a CASF Needs Shoring Up.

D.07-09-020 observes that “[p]roviding funding under Pub. Util. Code § 793.3 for deployment of broadband facilities in unserved and underserved high cost areas of California is

¹⁰ *Id.* at 64.

¹¹ *See id.* at 131, Conclusions of Law (“COL”) 18 and 19.

¹² *Id.* at 64-65 (emphasis added).

necessary to meet the objectives of universal service.”¹³ Whether this claim is factually correct or not, PU Code § 739.3 contains no language that directly authorizes the Commission to collect and expend moneys for deployment of broadband facilities. Instead, PU Code § 739.3, subd. (c), provides that “[t]he Commission shall develop, implement, and maintain a suitable, competitively neutral, and broadband program to establish a fair and equitable local rate support structure aided by universal service rate support to telephone corporations where the cost of providing services exceeds rates charged by providers” Accordingly, the purpose of any fund created pursuant to this provision must be “to establish a fair and equitable *local rate support structure*”¹⁴ in high cost areas. It is unclear how funding the construction of broadband facilities would create a “fair and equitable *local rate support structure*” in such areas.¹⁵

D.07-09-020 does purport, at least in part, to satisfy this requirement. The decision states: “. . . we propose that a limited allocation consisting of B-Fund money should be used to pay for some of the infrastructure costs of broadband facilities in California’s unserved or underserved high cost areas, with the express goal of minimizing any disparity in rates for basic telephone service between high cost areas and urban areas which will ensure that the goals of universal telephone service are met.”¹⁶ A connection between the proposed action (subsidizing the construction of broadband facilities in high cost areas) and the desired goal (minimizing a disparity in rates) can be *asserted*, but the factual basis for the assertion is not clear. In this instance, it must be remembered that the asserted disparity of rates between high cost and low cost areas does not exist today and may never exist, and even if it did come into being, it would not necessarily be alleviated through offering “basic telephone service” on or through the

¹³ *Id.* at 64.

¹⁴ *Id.* (emphasis added).

¹⁵ Increasingly, the marketplace seems to be delivering broadband services separate and apart from “basic telephone service,” leaving it to customers to decide, for example, whether they want their “voice service” from wireless carriers and broadband service from a cable modem-based provider or a wireless provider. There is no inherent connection between broadband service and development of a “local rate support structure.”

¹⁶ *Id.* at 68.

broadband infrastructure created with CASF assistance.¹⁷ Even assuming that the “basic” service envisioned in D.07-09-020 is a Voice over Internet Protocol (“VoIP”) service, the asserted connection is difficult to perceive. VoIP service would require an end user to have a computer of recent vintage (with an operating system of recent vintage), a broadband router, an Internet Service Provider, and “basic service” being offered by a VoIP provider over which the Commission would not even have jurisdiction.¹⁸ The Commission could not require the VoIP provider to offer “basic service” at any particular rate, for example. Thus, the asserted connection could benefit from further attention in the next decision.

Nonetheless, D.07-09-020 states: “We believe we have authority under existing statutes to use the CHCF-B [to fund the CASF] as long as *basic telephone service* is one of the components of any broadband service.”¹⁹ This language is inherently unclear. Perhaps what the Commission meant to say, when it used the term “basic telephone service,” was “voice service.” Perhaps the use of the term “basic telephone service” was inadvertent. Did the Commission mean traditional wireline “basic service” being offered side-by-side with ILEC DSL service, in the same manner as ILECs offer such services today? Would that satisfy the “component” test? Or did the Commission mean that it would require, or at least expect, recipients of CASF moneys to include a VoIP service as part of any Internet access or “broadband service” package they might offer? Because D.07-09-020 does not fully answer these questions, the asserted

¹⁷ This assumes – without knowing – that D.07-09-020 envisions that the “basic telephone service” provided as a “component” of broadband service will be provided through a VoIP technology. However, as discussed in the text of these Comments, it is impossible to discern what the Commission actually means when it refers to “basic telephone service” provided as a “component of broadband service.” See *id.* at 69.

¹⁸ See *National Cable and Telecommunications Association v. Brand X Internet Services* (2005) 545 U.S. 967 (“*Brand X*”) (broadband Internet service is not a telecommunications service, but an information service). Since at least 1980, state regulatory commissions have not had (and do not have) jurisdiction over information (enhanced) services. See *In re Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)* (1980) 77 F.C.C. 384, 417-423 and its progeny; see 47 U.S.C. § 153(20) (definition of an information service). See *Brand X*, *supra*, 545 U.S. at 977-78, 987-90, and 992-94.

¹⁹ D.07-09-020 at 69 (emphasis added).

connection between a CASF and the purposes underlying PU Code § 739.3 needs shoring up.²⁰

The Commission would be more likely to realize the goals of the CASF if it were to shore up the legal rationale for the program. And, as explained below, the Commission needs to clarify the term “basic telephone service” to ensure that the CASF is administered in a technologically neutral manner.

3. None of the Other “Existing Statutes” Discussed in D.07-09-020 Appears to Provide the Requisite Authority for Creation of a CASF.

None of the other “existing statutes” discussed in D.07-09-020 appears to provide the requisite authority for the creation of a CASF. PU Code § 709 identifies “policies for telecommunications in California” but does not authorize, and has not previously been read by the Commission to authorize, the creation of an advanced services fund.²¹ Ironically, the Commission points to the “build-out requirements” ordered by the Legislature in the Digital Infrastructure and Video Competition Act of 2006 (“DIVCA”)²² “. . . to ensure service was made available to all Californians, particularly low income and rural citizens.”²³ DIVCA appears to reflect direct and specific legislative attention to this subject. The “build-out requirements” in

²⁰ In fact, many of the most rural areas in California are not served by ILECs that are supported by the CHCF-B, but rather by Small Local Exchange Carriers (“Small LECs”) that are supported by the CHCF-A. Those areas would be completely outside the scope of the CASF envisioned in D.07-09-020. Thus, the validity of the claim that a CASF funded by the CHCF-B would assist in addressing the high cost of basic service in California’s most rural areas is questionable.

²¹ *Id.* D.07-09-020 quotes PU Code § 709 in full at 61-62 and points to the policies of encouraging “development and deployment of new technologies” and “the ubiquitous availability of a wide choice of state-of-the-art services” and “state-of-the-art technologies” identified in PU Code § 709, subds. (c) and (d), *see id.* at 54-55, but neither of the cited “policies” empowers the Commission to collect or expend funds collected from ratepayers. Related PU Code provisions cited in D.07-09-020, *see id.* at 59, n. 90, and at 63, n. 102, such as § 709, subd. (e), § 709.6, subd. (c), and § 709.7, as well as §§ 5810, subds. (a)(1) and (a)(2)(E), likewise evidence the Legislature’s unquestioned interest in encouraging the availability of such services, but do not confer authority on the Commission to collect or disburse funds for a CASF.

²² Codified at PU Code §§ 5800 *et seq.*

²³ *Id.* at 59. D.07-09-020 points to PU Code § 5890 regarding the “build-out requirements.” The sanctions in PU Code § 5890, subds. (g) and (h), for an unexcused failure to meet these requirements appear to be so severe (possible loss of statewide franchise as well as a substantial fine) that it seems more likely than not that the requirements would be satisfied, thereby calling into question whether, and to what extent, there would actually be a need for a CASF. It also must be asked: if statewide video franchise holders already have build-out requirements as a consequence of obtaining their franchises, should they not be required to fulfill those requirements without the aid of any subsidies, since they accepted those requirements without any promises that subsidies would be extended to them?

DIVCA, however, do not appear to confer authority on the Commission to collect and disburse funds from a CASF.

In D.07-09-020, the Commission points to PU Code §§ 270-281, providing for the creation of specific funds in the State Treasury and “Advisory Boards” to assist the Commission in administering such funds. Specifically, PU Code § 270, subd. (b), provides that “[m]oneys in the funds,” such as the CHCF-B fund, “are the proceeds of rates and are held in trust for the benefit of ratepayers and to compensate telephone corporations for their costs of providing universal service.”²⁴ The statute provides that such funds may *only* be expended “pursuant to this chapter”²⁵ Even more specifically, the statute provides that: “Moneys in each fund may not be appropriated, or in any other manner transferred or otherwise diverted, *to any other fund* or entity, except as provided in Sections 19325 and 19325.1 of the Education Code.”²⁶ Within this chapter, PU Code § 276 permits the California High-Cost Fund-B Administrative Committee “. . . to advise the commission [regarding] a program to provider for transfer payments to telephone corporations providing local exchange services in high-cost areas in the state to create fair and equitable local rate structures, as provided for in Section 739.3.”²⁷ The CHCF-B Administrative Committee may also advise the Commission regarding “. . . the development of a grant program for the construction of telecommunications infrastructure as set forth in Section 276.5.”²⁸

²⁴ D.07-09-020 is not completely consistent in its view of PU Code § 270. On the one hand, in the discussion on pages 66 and 67 of the decision, the Commission appears to view Chapter 1.5 (including PU Code § 270) as providing authority for creation of the CASF. On the other hand, however, in footnote 115, D.07-09-020 dismisses concerns raised by AT&T California and Verizon California by stating that “. . . the limitations of section 270 do not apply.” In support of this claim, the Commission asserts that “. . . the CASF is not a transfer or diversion of funds to another fund but is an expansion of an existing program” This eye-opening claim could benefit from further attention. If the proposed CASF were not “a transfer or diversion of funds,” it is difficult to imagine what would be.

²⁵ *Id.*, referencing Chapter 1.5 of the Public Utilities Act.

²⁶ *Id.*, subd. (c)(emphasis added). The referenced sections of the Education Code have no bearing on creation of a CASF.

²⁷ *Id.*, subd. (a).

²⁸ *Id.*

PU Code Section 276.5, however, limits the use of CHCF-B funds in at least three different ways. First, funds may only be used “. . . to aid in the establishment of telecommunications service in areas not currently served by existing local exchange carriers.”²⁹ By definition, this excludes all areas that presently have local exchange carriers providing service – *any service*. The second limitation is that the funding level may not exceed ten million dollars per year.³⁰ The third limitation is that grant requests must come from a “community-based group representing a qualifying community” for the purpose of building “an original telecommunications infrastructure that can provide basic telecommunications service . . . [in] an area . . . that currently lacks basic telecommunications services, as described in Decision 96-10-066”³¹ To say that the CASF envisioned in D.07-09-020 – which would provide subsidies for broadband infrastructure in high cost areas that do not have broadband services or are served by only one broadband service provider³² is the same as the program for grants to “community-based groups representing qualifying communities” in areas that have no telephone service at all appears to “stretch” the statutory limitations by quite a bit. In short, any claim in D.07-09-020, if there is one, that PU Code §§ 276 and 276.5 provide the Commission with the authority it requires *for a CASF*, needs further attention. Closely read, even D.07-09-020 does not actually go that far.³³ Thus, the Commission should be hesitant to use CHCF-B funds for such an important program as the CASF, lest it be seen as diverting funds without statutory authority.³⁴

²⁹ PU Code § 276.5, subd. (a).

³⁰ *Id.*

³¹ *Id.*, subd. (b).

³² See D.07-09-020 at 71 (“. . . areas not served by facilities capable of providing 3 MBPS download and 1 MBPS upload speeds, and . . . underserved areas (e.g. areas with only one facilities-based provider capable of providing those speeds to all customers)”). It is plain that the “unserved” or “underserved” areas the Commission has in mind in D.07-09-020 are areas that are “unserved” or “underserved” *with broadband services*, as opposed to the “unserved” (*not* “unserved” *and* “underserved,” but “unserved”) areas envisioned by PU Code § 276.5, namely, areas that have no basic telephone services at all.

³³ See *id.* at 67.

³⁴ See *Assembly of the State of California v. Public Utilities Commission* (1995) 12 Cal. 4th 87 (“*State Assembly*”). The Commission attempts to limit the reach of this decision to a limitation on its power to “create new funds” from “refunds to ratepayers.” See D.07-09-020 at 69, n. 117. However, the CHCF-B funds that the Commission will use

4. PU Code § 701 Does Not Confer the Requisite Authority to Create the CASF.

As if recognizing that it may lack the requisite authority under PU Code § 739.3 and Chapter 1.5 (as reflected in PU Code §§ 270, 276 and 276.5), the Commission also solicits comment on whether it is authorized to create a CASF under PU Code § 701. PU Code § 701 authorizes the Commission to “. . . supervise and regulate every public utility in the State” and “do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.” The Commission may indeed be empowered to “do all things necessary and convenient” in the exercise of its jurisdiction, but this power does not authorize the Commission to exceed its jurisdiction or to disregard specific legislative restrictions, including those in Chapter 1.5 of the Public Utilities Act, permitting expenditures *only* for the purposes specified therein.³⁵ Specifically, Section 270, subds. (b) and (c), limit the power of the Commission to expend moneys to the purposes set forth in Chapter 1.5. As previously discussed, the purposes authorized in PU Code § 276 are either (a) transferring funds to telephone corporations “. . . to create fair and equitable local rate support structure” or (b) the development of a grant program under PU Code § 276.5. As explained above, the Commission would do well to explain how the CASF fits within these parameters. Given the caution in *State Assembly* that PU Code § 701 does not permit the Commission to disregard restrictions imposed by the Legislature, the Commission would likely do well not to rely on PU Code § 701 as the primary source of authority for the CASF.

for the CASF are arguably CHCF-B surcharge overcollections that should be refunded to ratepayers. Moreover, the unanimous Supreme Court decision in *State Assembly* has come to stand for a much larger proposition, namely, that in dealing with ratepayer funds, the Commission should hew as closely as possible to its governing statutory authority. *See id.*, 12 Cal. 4th at 103-04 (rejecting, *inter alia*, any claim that PU Code § 701 gave the Commission authority to override express legislative restrictions). The effort, if it is one, to brush aside restrictions in PU Code §§ 270, 276, 276.5 and 739.3 in moving quickly to create the CASF does not comport with *State Assembly*.

³⁵ *See State Assembly, supra*, 12 Cal. 4th at 103-04, explaining that, “Past decisions of this court have rejected a construction of section 701 that would confer upon the Commission powers contrary to other legislative directives, or to express restrictions placed upon the Commission’s authority by the Public Utilities Code. [Citation.]”

5. Express Legislative Authority for this Important Initiative Would Appear to Be Desirable.

The result of this exploration of the Commission's existing statutory authority is not that the Commission should abandon the goal of supporting the deployment of advanced services to underserved areas in California. On the contrary. In Sprint Nextel's view, this review of the Commission's existing jurisdiction points toward the desirability of seeking explicit legislative authorization for the creation of a CASF. This could be done in conjunction with extending the expiration of PU Code §§ 739.3 and 276.5 beyond January 1, 2009. If, after debate, the Legislature and the Governor support a CASF, the enactment of such legislation, and making it effective upon the date of signing by the Governor, should not be difficult. Such an enactment would remove the legal uncertainty surrounding this program and would provide parties with the requisite assurance that any funds received through the CASF program could be expended without fear of recovery by the State in the future.

In addition, as discussed below, legislation that directly authorized the creation of a CASF would eliminate the need for the Commission to attempt to "shoehorn" the CASF into existing statutory authority by insisting that "basic telephone service" be offered as a "component" of any broadband services funded by the CASF.³⁶ This would enhance the prospects for the CASF being technologically neutral. Most of California's carriers do not offer "basic service" (at least as it was defined in D.96-10-066). If the Commission obtained direct authorization for a CASF from the Legislature, broadband service providers would not be obliged to offer a "voice" "component" themselves but could leave it to customers in the marketplace to decide whether they wanted to subscribe to a VoIP service from a VoIP provider or obtain voice service in some other manner. With such an approach, the Commission would not be intervening as directly in the competitive marketplace as D.07-09-020 may lead it to do.

³⁶ See D.07-09-020 at 69.

B. Substantial Policy Issues Also Point toward the Desirability of Legislation Directly Authorizing Creation of a CASF.

Sprint Nextel can of course anticipate the most likely objection, namely, that obtaining authority for a CASF through urgency legislation would, at a minimum, be time-consuming, if not difficult or impossible. In noting how quickly the ACR followed the issuance of D.07-09-020,³⁷ Sprint Nextel can certainly perceive a sense of urgency on the Commission's part. The Commission apparently wants to move as quickly as possible in creating a CASF and disbursing funds to broadband service providers, at a minimum before PU Code § 739.3 expires.

As mentioned above, however, the Commission would do well to first consider whether and where, if at all, there is a need for a CASF. The Commission should direct the Communications Division ("CD") to gather additional information, beyond that already gathered for the May 2005 Broadband Report and the September 2006 Update Report, on the current availability of broadband services, the speed of different broadband services, the prices paid for different broadband services, and whether the *unregulated* broadband services that are currently being offered to consumers in different areas are being provided on a stand-alone basis or packaged with other service offerings (including but not limited to VoIP services). The CD should map the new data it collects so that the Commission has an even better view of the areas of California in which broadband service needs a boost, and the areas where such a boost is not necessary. This will help ensure that any funds that are spent are well spent.

There are many important policy questions the Commission should consider *before* moving forward to solicit applications for CASF funds. These policy questions include the following:

³⁷ Technically, the ACR, dated September 12, 2007, preceded D.07-09-020, which officially was issued September 13, 2007 but was first issued on September 7, 2007.

- Which entities are the proper recipients of CASF funding? Should CASF funds be limited solely to ILECs? Or should all telecommunications utilities be eligible to receive CASF funds if they can present a worthy proposal to the Commission?
- What areas are the proper recipients of CASF funding? Should CASF funding be limited to “high cost” areas defined by the \$36 “high cost benchmark” adopted in D.07-09-020? Or should “high cost” areas include all of the areas in California, whether rural or urban, where deployment of broadband facilities would be a “high cost” undertaking? Population density is a key driver of the economics of broadband deployment. At what point does the lack of population density simply make it economically unfeasible for the provision of broadband services without subsidy? What timeframe should be for achievement of a reasonable return on investment for any business case seeking to claim CASF funds for “high cost” areas? What weight should be given to deliberate ILEC decisions to postpone deployment of broadband technology in certain areas?
- What are the most economic levels of funding? Should CASF funding be limited to the funding increment necessary for making an uneconomic project economic? Or should CASF funding extend to 100% of the capital needs for provision of broadband service in a particular area? What criteria should be used to distinguish uneconomic from economic projects? How small, or large, an area may be covered by a single project seeking CASF funding?
- How can provider costs be properly limited, as well as properly audited? What are the Commission resources available for auditing CASF fund recipients’ use of such funds? How could the Commission determine what CASF funds truly were necessary for provision of broadband service in a given area? How could the

Commission be assured that all CASF funds were actually used to fund provision of broadband service, and not for some other purpose?

- How can the Commission ensure that funding considers all technologies capable of providing advanced services? If only certain carriers offer “basic residential service” as defined in D.96-10-066, are those the only carriers that could offer “basic service” as a “component” of broadband services? If so, would other carriers be excluded, by definition, from participating in a CASF program? If so, would the CASF program be as technologically neutral as D.07-09-020, at least in part, apparently envisions it would be?³⁸ And if so, how would that be competitively neutral? How would it impact intermodal broadband competition?
- How should funding be divided among equally qualified recipients?
- How can the Commission ensure that end users that benefit from the program also contribute to its support, even if they are consumers of non-jurisdictional “information services”?
- What is the optimal size of the CASF? Should it be \$10 million? \$100 million? \$500 million? D.07-09-020 leaves this open to speculation. The impression left by D.07-09-020 is that the size of the CASF will depend on the extent to which the Commission elects not to refund to ratepayers any “surplus” CHCF-B funds that were collected from them through the CHCF-B surcharge, but rather to retain the seeming “surplus” and redirect it toward the CASF. The legality of this approach may well be subject to question under *State Assembly*, as explained above. It would not be surprising if such a “surplus” rationale were challenged in

³⁸ See D.07-09-020 at 60 (“... limiting universal service to particular technologies skews competitive forces . . .”) and at 68 (“Such fund may be administered on a technology neutral basis by the Commission . . .”). The Commission is undoubtedly correct in D.07-09-020 that limiting the choice of technologies eligible to receive CASF funds “. . . may even prevent consumers in high cost areas from ever receiving advanced communication services and the economic and social benefits that flow from such services.” *Id.* at 60.

court. The Commission would thus do well to shore up the rationale under which it may use any “surplus” CHCF-B funds. If it does so, the Commission could help resolve any policy questions regarding the size of a CASF fund.

- How can the Commission ensure, at the end of the day, that all of the CASF program objectives are accomplished? What would the Commission consider “success”? What benchmarks would be used to assess a CASF program?

Sprint Nextel could continue listing relevant policy questions, but several conclusions come readily to mind from even this limited set of policy questions.

First, the Commission would likely do well to take the time needed for resolving these and other related policy questions, so that all parties know what the CASF is for and about, *before* it solicits applications for CASF moneys. The Commission should not simply say that “the window is open for submission of applications” and then award funds simply because it has received proposals for use of CASF moneys. It should certainly address these policy questions before it disburses any CASF moneys. In addition, while considering these important policy issues, the Commission could follow the desirable course, as indicated above, of seeking direct authority for the CASF from the Legislature.

Second, if the Commission, notwithstanding this well intentioned recommendation, nonetheless elects to move forward immediately, it would likely do well to initiate the CASF program as a pilot program, one that is small enough for the Commission to manage and oversee effectively, so that any mistakes that might occur will only occur on a small scale, without substantial consequences for the ratepayers whose funds have been taken from existing CHCF-B program purposes and devoted to new CASF program purposes. Starting small will allow the Commission to refine its approach and understand which uses of CASF funds are likely to succeed and which uses will not succeed.

Third, developing a CASF program is likely to be substantially more difficult than D.07-09-020 appears to recognize. Sprint Nextel does not have “the” answers to the policy issues above – it does not have “the” answers at this time because the issues are very difficult. The Commission will have to develop exacting criteria for deciding how to award funds between competing applicants. However, the slightest unfairness in the criteria governing the selection of winning “bidders,” as it were, is likely to result in litigation challenging the manner in which the Commission has awarded CASF funds, especially if the applicants are equally well qualified and present equally meritorious proposals for expanding service to high cost areas. The program should be governed by well-drawn regulations explaining exactly what applicants and recipients are expected to do, lest disputes develop between broadband service providers and the Commission or its staff whether CASF funds have been correctly sought and utilized. Underestimating the difficulties ahead could doom the CASF program from the outset.

Fourth, Sprint Nextel concludes that the difficulty and number of the relevant policy questions, such as those listed above, strongly tips the balance in favor of seeking new legislation to authorize the CASF program. This will permit the Legislature to provide its guidance to the Commission on such vital questions as the size of the CASF and the extent to which the Commission could surcharge ratepayers to support this program. The issue is *not* whether the Commission should justify a CASF program under PU Code §701 or PU Code § 739.3, since neither statute provides as strong a basis for creating a CASF program as might be desirable, but rather whether new legislative authority would make it easier for the Commission to resolve such crucial policy issues on a more principled and less *ad hoc* basis. Viewed from this perspective, the need for and desirability of having new authorizing legislation is practically beyond dispute. If creation of a CASF program is a good idea, and if the Commission is the proper body to administer CASF funds, the Legislature should readily embrace a CASF program and provide

the Commission with a clear statement of goals the Legislature considers important and the manner in which the Commission should proceed. In this manner, achievement of the goals envisioned in D.07-09-020 will more readily be achieved and be more sustainable, and parties will be spared any nagging doubts as to what the Legislature, had it been consulted, would have authorized.

II. THE ACR'S QUESTIONS CONCERNING FUNDING OF THE CASF APPEAR TO CALL FOR CONSIDERABLE SPECULATION.

The ACR next asks parties to comment on issues related to the source of funding of the CASF:

2. What overall dollar amount, funding source(s), and time considerations are appropriate for the CASF to build advanced infrastructure in California? To what extent should matching funds be required? To what extent, and subject to what criteria, should existing B-Fund contributions (versus independent sources) be used to fund the CASF?

Sprint Nextel agrees these are all important questions. However, they appear to call for considerable speculation by the parties. A \$10 million program would be vastly different from a \$100 million or \$300 million program. As indicated above, it would be helpful to get a sense from the Commission whether it envisions a small, medium or large-sized CASF program. A program that is deliberately kept small at the outset may help ensure that all moneys are well spent and are not wasted on poorly conceived projects. Moreover, a program that is small at the outset is likely to result in fewer market distortions and smaller interferences with competitive market forces. A smaller program will be easier to oversee and to audit. As a market competitor investing substantial amounts of privately generated capital to bring advanced wireless services to California, Sprint Nextel is strongly in favor of a rule that no CASF-funded project should be funded entirely by CASF program funds. Perhaps no less than 80% of each CASF-assisted project should come from the applicant's own capital resources. This may help assure that the

CASF funds only the small increment of the cost of any project that makes it uneconomic.

Requiring shareholders to share in the risk of any CASF-funded projects will help assure that projects are serious, substantial, truly necessary and well conceived. In that sense, Sprint Nextel favors a requirement of “matching funds” and “independent sources” of funds (assuming that is the sense in which the ACR is using these terms). Legislative guidance would greatly assist the Commission in addressing these questions.

III. INCLUDING A REQUIREMENT THAT “BASIC RESIDENTIAL SERVICE” MUST BE A COMPONENT OF ANY BROADBAND SERVICES FUNDED BY THE CASF CREATES A SUBSTANTIAL RISK THAT, AS MATTERS PRESENTLY STAND, THE CASF WILL NOT BE TECHNOLOGICALLY NEUTRAL, BUT WILL DISCRIMINATE AGAINST WIRELESS CARRIERS.

In its third set of issues, the ACR directs parties to consider whether the Commission should require parties seeking funding under the CASF program to demonstrate that they provide “basic residential service”³⁹ as a component of their broadband services:

3. What process should be established for prospective applicants to apply for and receive grants of CASF money for the purpose of deploying broadband services which will include as one component basic residential service within underserved or unserved areas consistent with universal service goals as discussed in D.07-09-020?

Sprint Nextel is concerned that the tentative rationale for a CASF expressed in D.07-09-020 – namely, that the CASF could be justified within the parameters of the high cost support program funded by the CHCF-B if “basic telephone service” or, alternatively, “basic residential service” were a “component” of any broadband services funded by the CASF⁴⁰ – could serve to prevent the CASF from being technologically neutral. If being a provider of “basic service” as that term is defined in D.96-10-066 were a requirement of any funding applicant, it would all but

³⁹ D.07-09-020 refers, at 69, to “basic telephone service” being a “component” of CASF-funded broadband service. In contrast, the ACR refers, at 2, to “basic residential service” being included as a “component” of broadband service. It is not clear what the Commission intends. In its next decision in this proceeding, it would be helpful if the Commission could explain that it only means “voice service” (such as a VoIP service) and not “basic service” or “basic residential service” as defined in D.96-10-066, if, in fact, this is what the Commission means.

⁴⁰ See D.07-09-020 at 69.

guarantee that only the current providers of “basic residential service” in California (other than the “Small LECs”), *i.e.*, only current Lifeline service providers, could qualify for CASF funds. In other words, by definition, this parameter could unfairly and improperly exclude wireless carriers from the outset and ensure that the CASF was not technologically neutral. This would be a serious mistake, as it might result in Californians that are today either unserved or underserved with broadband service alternatives from gaining access to the most technologically advanced and most useful services.⁴¹ It is also very possible that wireless technology may be the most efficient technology to serve underserved and unserved “high cost” areas.

In general, Sprint Nextel believes that it is premature for the Commission to address the process for prospective applicants to apply for and receive grants of CASF money. Before the Commission can, or at least should, accept applications for CASF funds, it should undertake the information gathering effort described above and resolve the many vital policy issues that lurk just beneath the surface of the CASF program envisioned in D.07-09-020. Failure to understand precisely what is needed, and where it is needed, could result in a substantial waste of hard-earned ratepayer moneys. Failure to resolve the crucial policy issues first is likely to cause the Commission many difficulties in the future, including, but not limited to, determining whether a fund recipient has properly utilized the funds it received. Once it has resolved the critical policy issues, the Commission will be in a much better position to design the application process to ensure that it receives the information it needs for (a) evaluating proposals, (b) evaluating applicants, (c) selecting CASF funding recipients on a fair, principled, and non-discriminatory basis, and (d) auditing projects to ensure that CASF funds have been properly used. Again, legislative guidance could substantially assist the Commission in resolving these issues.

⁴¹ See n. 38, *supra*.

IV. THE APPLICATION PROCESS SET FORTH IN APPENDIX 3 TO D.07-09-020 REQUIRES FURTHER REFINEMENT, INCLUDING THE APPOINTMENT OF A NEUTRAL BOARD FOR SELECTION OF CASF FUNDING RECIPIENTS.

The ACR asks parties to comment on the proposed process for administering applications for CASF funding:

4. Comments are solicited on the merits of the process to apply for funding the California Advanced Services Fund in Appendix 3 of D.07-09-020 (attached to this ruling for reference). Are there additional requirements that should be added to help avoid waste, fraud, and abuse? For any suggested modifications, clarifications, or refinements to the process proposed in Appendix 3, parties should provide supporting rationale.

Sprint Nextel believes that the criteria as well as the process envisioned in Appendix 3 to D.07-09-020 for applications for CASF funding require substantial revisions in order to ensure that it is both technologically neutral and administratively fair and even-handed. Among other things, the Commission should consider appointing a neutral board of third-parties to evaluate applications and to advise the Commission on the appropriate parties and areas and most efficient technologies to be selected for CASF funding. Rather than repeat its prior responses, Sprint Nextel respectfully directs the Commission to its responses above to the second and third sets of questions.

V. THE PROPOSAL FOR A “60-DAY WINDOW FOR RECEIPT OF COMPETING APPLICATIONS” APPEARS TO HAVE SUBSTANTIAL MERIT.

In the fifth set of issues, the ACR provides:

5. Comments are solicited as to whether an application for CASF funding should trigger and open a 60-day window for other applications for substantially the same geographic area.

For several reasons, Sprint Nextel believes this proposal will likely have substantial merit. First, it would ensure that CASF funding is not simply “a race to the Commission’s doorsteps.” Second, it would ensure that the Commission is able to select the proposal with the greatest

merit, and not simply the proposal that arrived first at the Commission. Third, this approach is likely to result in the Commission receiving better proposals for use of CASF funds. On the other hand, however, this approach would likely result in funding applicants being reluctant to “go first,” since other parties then would have 60 days in which to design a competing, and possibly superior, proposal. The party that “went first” would likely consider itself disadvantaged by having done so. Alternatively, if the Commission elected to begin with a small pilot project, it could describe the project goals and requirements with particularity and then identify a single deadline by which all competing applications had to be submitted.

In any event, Sprint Nextel is concerned that, while 60 days may be adequate for parties to prepare comments on a CASF funding proposal (though no less than 60 days should be provided for this purpose⁴²), 60 days may not be adequate time for submission of a competing proposal. Without knowledge of the information and the level of detail that the Commission would require funding applicants to provide with their applications, Sprint Nextel has no assurance that 60 days would be an adequate amount of time for parties to submit a “competing” application. Finally, for the reasons already stated, before addressing this detail of any application process, the Commission would do well to refrain until it had first more generally gathered the necessary information and resolved the critical policy issues.

VI. AUDITING THE CASF PROGRAM WILL BE DIFFICULT UNDER THE BEST OF CONDITIONS AND MAY PROVE TO BE IMPOSSIBLE.

In the sixth set of issues identified for comment, the ACR directs parties’ attention to the need for tight auditing, verification and other controls in order to achieve the Commission’s universal service goals:

⁴² For example, suppose a funding applicant asserted that a particular area was unserved or underserved with broadband alternatives. The Commission would do well to allow for a comment period in which an existing broadband service provider could dispute the assertion that the area was unserved or underserved. The existing provider might well have no need or desire for CASF funds, *i.e.*, it might not wish to submit a “competing” application. It might simply wish to ensure that a belated market entrant did not receive unfair and anticompetitive assistance from the Commission through the CASF program.

6. D.07-09-020 stated that CASF applicants must meet specific audit, verification, and other requirements with respect to the use of the funds, subject to procedures adopted in the next phase of the proceeding. Parties should identify specific audit, verification, and other requirements that would be warranted as a basis to administer the CASF funding consistent with the universal service goals as discussed in D.07-09-020.

Sprint Nextel is concerned that, under the best imaginable circumstances, auditing a CASF program will be difficult and may, in fact, prove to be impossible. The Commission may find that it has insufficient means and criteria for judging which levels of investment, which expenses, which overheads, which equipment and facilities, etc., are actually necessary. Moreover, there is a real danger that, if the Commission were to select a party without a proven track record in the actual delivery of advanced services to consumers, it could find itself with projects that were never finished, due to an alleged lack of funds, with fund recipients no longer available to account for use of CASF moneys. Sprint Nextel incorporates by reference its responses to the issues above.

VII. IT IS DIFFICULT TO IMAGINE THE CIRCUMSTANCES UNDER WHICH THE COMMISSION COULD DISBURSE SURCHARGE FUNDS TO ENTITIES OTHER THAN PUBLIC UTILITY “TELEPHONE CORPORATIONS.”

In the seventh set of issues on which the ACR seeks comment, parties are asked whether potential recipients of CASF funding should be limited to “telephone corporations” within the meaning of PU Code § 234:

7. If Pub. Util. Code § 739.3 is the basis for the CASF, comments are solicited as to whether the use of the term “telephone corporation” in that section may limit recipients of CASF money to those entities qualifying under Pub. Util. Code § 234.2

Sprint Nextel believes that it is difficult to imagine the circumstances under which the Commission could disburse surcharge funds (assuming that CASF funding, for example, came from the CHCF-B surcharge) to entities other than public utility “telephone corporations” within

the meaning of PU Code § 234, whether the CASF program is undertaken pursuant to PU Code § 739.3 or some other authority. For all the reasons set forth above, if the Commission were to seek legislative authorization for a CASF program, this would surely be a question to which the Legislature would direct its attention.

In any event, the Commission may find that the proposed limitation of CASF funding to public utility telephone corporations is less of a limitation on potential recipients than it may imagine. The Commission has attempted, under current certification requirements and procedures, to undertake such screening of certificate applicants as its resources would allow. Nonetheless, it is not always clear whether the Commission has all of the resources it might desire to screen certificate applicants and verify whether they have adequate resources and adequate experience to operate as a public utility. Until more is known about the CASF program, it is not certain how much of a limitation on applicants would be achieved by limiting CASF funding to public utility telephone corporations under PU Code § 234.

Conclusion

For the reasons set forth above, the Commission should shore up the legal and policy rationales for creating a CASF program, and may do best to seek legislative authorization that would eliminate any uncertainty regarding its jurisdiction to do so. The Commission should also gather more information regarding the need, if any, for a CASF program in California. Further mapping of such information would help the Commission understand where a CASF program may be needed, and how a CASF program could help ensure that unserved and underserved areas enjoy broadband services in the future. Finally, the Commission should address and resolve the critical policy issues associated with creation of a CASF program, such as those identified above, before it solicits CASF funding applications or otherwise undertakes a CASF program.

Respectfully submitted:

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Dated: September 26, 2007

Certificate of Service

I, Earl Nicholas Selby, hereby certify that, on September 26, 2007, I caused a copy of the foregoing document, entitled:

**OPENING COMMENTS OF SPRINT NEXTEL
ON ASSIGNED COMMISSIONER'S RULING ON
PHASE II ISSUES RELATING TO THE
"CALIFORNIA ADVANCED SERVICES FUND"**

to be served on the parties to this proceeding by electronic mail to the electronic mail addresses on the service list maintained on the Commission's Web site for this proceeding, as indicated on the following page.

I also certify that, on September 26, 2007, I caused a copy of the foregoing document to be served on the following persons at the California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, CA 94102, by United States Mail, first class postage prepaid:

Commissioner Rachelle B. Chong, Advisor Robert Haga, and Administrative Law Judge Thomas R. Pulsifer. I further certify that, on September 26, 2007, I caused a copy of the foregoing document to be served on: La Tanya Linzie, Cox California Telcom, LLC, 2200 Powell Street, Suite 1035, Emeryville, CA 94608, by United States Mail, first class postage prepaid.

I certify that the above statements are true and correct.

Dated: September 26, 2007 at Palo Alto, CA.

_____/s/
Earl Nicholas Selby

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